United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

ISSUE PRESENTED

Did the brief questioning of appellant by the trial judge regarding prior testimony by appellant, coupled with the instruction given to the jury that a witness' credibility could be impeached by a showing that the witness had previously made statements inconsistent with his present testimony, amount to plain error?

This case has not previously been before this Court under any other name.

INDEX

	Page
Counterstatement of the Case	1
Summary of Argument	3
Argument:	
I. The trial judge's short examination of appellant was within his prerogative, and did not constitute an abuse of his discretion	4
II. The trial judge's instructions, challenged for the first time on appeal, were proper and do not constitute reversible error	6
Conclusion	7

TABLE OF CASES

Adler v. *United States*, 182 Fed. 464 (5th Cir. 1910)	5
**Budd* v. *United States*, 48 U.S. App. D.C. 332 (1919)	4
**Cantrell* v. *United States*, 116 U.S. App. D.C. 311, 323 F.2d 613 (1963), *cert. denied*, 376 U.S. 955 (1964)	6
Garber v. *United States*, 145 F.2d 966 (6th Cir. 1944)	5
**Glasser* v. *United States*, 315 U.S. 60 (1941)	4
**Griffin* v. *United States*, 83 U.S. App. D.C. 20, 164 F.2d 903 (1947), *cert. denied*, 333 U.S. 857 (1948)	4
Quercia v. *United States*, 289 U.S. 466 (1933)	5
**Roberts* v. *United States*, 284 F.2d 209 (D.C. Cir. 1960), *cert. denied*, 378 U.S. 863 (1961)	4
**Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950)	6, 7

OTHER REFERENCES

22 D.C. Code § 2901	1
Rule 30, Fed. R. Crim. P.	6
Junior Bar Model Jury Instructions, Nos. 11, 12, 20	7

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* Cases chiefly relied upon are marked with asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,386

ELVIN GRAHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, Elvin Graham, was charged with two counts of robbery (22 D.C. Code § 2901). On June 2, 1967, he was acquitted by a jury of the charge set forth in Count I, and the jury was unable to agree on Count II, which charged that on or about July 30, 1966, the appellant did by force and violence take from one Sing Lee Wong property in the value of $158, consisting of $150 in cash and a tear gas gun valued at $8.

Appellant was retried by jury on Count II, before Judge Oliver Gasch, and found guilty. At the retrial, Sing Lee Wong testified that while standing outside his restaurant

appellant hit him on the head, and took from him $150 in cash and a tear gas gun (Tr. I, 19, 22).[1] Officer Eugene Mower testified that he arrested appellant at his home and there recovered a tear gas gun which was subsequently identified as being the one stolen from Mr. Wong (Tr. I, 31). Both Mr. Wong and Officer Mower testified that the alleged robbery occurred at approximately 11:30 P.M. on July 30, 1966 (Tr. I, 17, 58).

The appellant testified in his own behalf. He set the time of the incident at 8-9:00 P.M. He denied that he had taken any money from Mr. Wong. He admitted, however, arguing with Mr. Wong, and striking him:

> "And after I got him down on the ground, I hit him one lick, and he had this gun and he pulled this gun out of his pocket and I could hear it snapping up at the side of my head. So I reached up and took the gun and got up off of him and went home." (Tr. I, 35-36).

Following the conclusion of the cross-examination of appellant, Judge Gasch asked him the following two questions:

> THE COURT: Wait a minute, I have a few questions of you. You didn't tell us anything about the Chinaman snapping the gun at your head when you testified previously, did you?
> THE WITNESS: Yes, I did. I told you that before.
> THE COURT: Are you sure of that?
> THE WITNESS: Yes, sir.
> THE COURT: All right. (Tr. I, 44)

A Mr. Luke D. Wheatley was also called as a defense witness. Mr. Wheatley testified that he did not hear the clicking of a trigger (Tr. I, 51).

At the close of the evidence Judge Gasch instructed the jury that actions by the court, including questioning of witnesses, was not to be interpreted as implying any opinion as to how the issues of fact should be resolved (Tr. II,

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[1] All transcript references relate to the two volumes of the retrial.

3-4).[2] The judge went on to instruct the jury thoroughly as to their responsibility for determining the credibility of witnesses. (Tr. II, 8-10). As part of the general credibility instruction, the judge stated that a witness' testimony could be impeached by a showing that he had made prior inconsistent statements.[3] No objections or requested modifications were made concerning these instructions.

SUMMARY OF ARGUMENT

In the federal courts, a trial judge may elicit the truth by an examination of the witnesses, so long as he does not present an appearance of partisanship. In addition, it is within the discretion of the trial judge whether to charge the jury on the subject of the credibility of witnesses. Appellant's failure to object to the charge as given should by itself dispose of his assertion of error on appeal. In any event, the instructions as given were proper and did not give rise to plain error.

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[2] The instruction is set out below:

> The actions of the Court during the trial in ruling on motions or objections by counsel; or in comments to counsel; or in questions to witnesses; or in setting forth the law in these instructions, are not to be taken by you as any indication of the Court's opinion as to how you should determine the issues of fact.
>
> If the Court has expressed or intimated any opinion as to the facts, you are not bound by that opinion. What the verdict shall be is your sole and exclusive duty and responsibility.

[3] The instruction on impeachment by prior inconsistent statements is set out below:

> Now, the testimony of a witness may be discredited or impeached by showing that he has previously made statements which are inconsistent with his present testimony. The prior statement is admitted into evidence solely for your consideration in evaluating the credibility of the witness. You may consider the prior statement only in connection with your evaluation of the credence to be given to the witness' present testimony in court. You must not consider the prior statement as establishing the truth of any fact contained in that statement.

ARGUMENT

I. The trial judge's short examination of appellant was within his prerogative, and did not constitute an abuse of his discretion.

(Tr. I, 12, 56-57).

In the federal courts, a trial judge may elicit the truth by an examination of the witnesses. *Glasser* v. *United States*, 315 U.S. 60 (1941); *Roberts* v. *United States*, 284 F.2d 209 (D.C. Cir. 1960), *cert. denied*, 368 U.S. 863 (1961); *Griffin* v. *United States*, 83 U.S. App. D.C. 20, 164 F.2d 903 (1947), *cert. denied*, 333 U.S. 857 (1948); *Budd* v. *United States*, 48 U.S. App. D.C. 332 (1919). In *Budd*, which was a prosecution for murder in the second degree, the defendant having been charged with the fatal burning of another by throwing a lighted lamp at her, the defendant contended that the deceased had assaulted her with a chair and that she threw the lamp in self defense. The defendant was examined by the trial judge as follows:

> Q. Was there any other chair there?
> A. There were two straight chairs there. . . .
> Q. Why did you not take one of those chairs?
> A. There wasn't any way in the world—
> Q. Why did you not take one of those to defend yourself with?
> A. There wasn't any way I could move.
> Q. You mean to tell me you could not have picked up one of those chairs?
> A. If I had—
> Q. Where were those chairs?
> A. The chairs were too far from me.

While the court recognized that a prolonged examination by the trial judge, or an examination conducted in a hostile or critical manner so as to indicate to the jury that the court disbelieves the witness, might be ground for reversal, it found nothing of that nature in the interrogatories addressed to the defendant by the trial court.

In the present case, even fewer questions were propounded by Judge Gasch to appellant. There is nothing

in the record to indicate that these were asked in a critical or hostile manner. While appellant suggests that the purpose of the examination was to bring before the jury appellant's prior inconsistent story, it is noteworthy that at the time these questions were asked, the trial judge was not sure that appellant's story was inconsistent. (Tr. I, 56-57.) In addition, the trial judge took great care in excluding any mention of the prior trial, as is evidenced by his insistence that the indictment be retyped so that only the second offense (Count II) would be brought to the attention of the jury. (Tr. I, 12). It would appear, therefore, that what the trial judge was attempting to do was to clarify appellant's story. Rather than being prejudiced by the questions, appellant was given an opportunity to assert the certainty of his recollection of his encounter with the complainant. Moreover, Judge Gasch safeguarded against any prejudice to appellant by his instruction indicating that his colloquy with appellant was not to be construed as implying any opinion as to his credibility.[4]

Appellant places great reliance on three cases, *Adler* v. *United States*, 182 Fed. 464 (5th Cir. 1910); *Quercia* v. *United States*, 289 U.S. 466 (1933); and *Garber* v. *United States*, 145 F.2d 966 (6th Cir. 1944). These cases do not support appellant's contentions. In *Adler*, the defendant's conviction was reversed because of the *lengthy* examination of the defendant's witnesses by the trial judge. The court noted that these examinations were critical and apparently hostile to the witnesses. They led to many obtions by the defendant's attorneys and to controversies between the attorneys and the judge. The court, however, upheld the general right of a trial judge to examine witnesses. *Quercia* did not deal with the right of the trial judge to examine witnesses, but with his right to comment on the evidence. While upholding this right generally, the court held that the comment in that case was improper where the court charged the jury that the defendant's wiping of his hands while on the stand was an indication that

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[4] See note 2, *supra*.

he was lying. Finally, we come to *Garber*, where, according to appellant, the lower court's decision was *reversed* because of the vigorous interrogation of the defendant by the court. However, while noting that the trial judge did *extensively* question the defendant in that case, we also note that this interrogation was deemed to be within the province of the trial judge and that the decision was therefore *affirmed*.

All of these cases serve to point out that the trial judge has a right to question witnesses, including the defendant, and that unless this right is severely abused, the trial judge's discretion in this regard will not be questioned on appeal. It is submitted that the instant case does not provide such an example of abuse in this regard. Judge Gasch propounded only two questions to the defendant and, in addition, was careful to instruct the jury that this was not to be taken by the jury as any indication of the court's opinion as to how they should determine the issues of fact.

II. The trial judge's instructions, challenged for the first time on appeal, were proper and do not constitute reversible error.

As part of his instructions, Judge Gasch told the jury that the testimony of a witness may be impeached by a showing that he has previously made inconsistent statements. Appellant asserts that this instruction heightened the impact of the judge's questioning of appellant during trial, and also asserts that he had a right to an instruction to the effect that the judge's questioning of him was not to be construed adversely to him.

Appellant's failure to make an appropriate objection or request before or after the judge's instructions should by itself dispose of his contention on appeal. *Cantrell* v. *United States*, 116 U.S. App. D.C. 311, 323 F.2d 613 (1963), *cert. denied*, 376 U.S. 955 (1964); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); Rule 30, Fed. R. Crim. P. By failing to object to the charge, appellant deprived the trial court of the oppor-

tunity to make additions or corrections before the jury retired to consider its verdict and thereby obviate the possibility of a futile trial. *Villaroman, supra* at 241, 184 F.2d at 262-63.

Moreover, the Government submits the instructions as given were error free. The instruction regarding impeachment of witnesses by prior inconsistent statements was one of a series of standard introductory instructions on credibility of witnesses [5] and cannot be fairly viewed as having zeroed in on the judge's questioning of appellant.[6] And the safeguarding instruction to the effect that the judge's questioning of appellant should not be construed adversely against him was in fact given.[7]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

WILLIAM S. BLOCK,
Special Assistant United States Attorney.

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[5] The judge's credibility instruction matches the standard statement of the Junior Bar Model Jury Instructions, Nos. 11, 12, 20.

[6] The charge indicated that credibility could be impeached only if there were a showing of a witness' having made prior inconsistent statements. The trial judge's colloquy with appellant constituted no such showing.

[7] The curing instruction is set out in note 2, *supra*.

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELVIN GRAHAM

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal No. 22386

MOTION FOR REHEARING

Comes now Harry W. Goldberg, Attorney for the Appellant in the above entitled cause, and respectfully requests that this Honorable Court grant a rehearing in this case and for reasons as follows:

1. On November 29, 1968, a judgment was entered in this case affirming the decision of the U. S. District Court for the District of Columbia.

2. Your appellant respectfully submits that in view of this Court's finding that the charge by the Court with respect to prior inconsistent statements had no basis in the evidence, and could only have related to the colloquy between the Court and the appellant; it is urged that the charge was in fact prejudicial. The appellant submits that although the colloquy may in and of itself been harmless, it was magnified by the Court's reference to this colloquy in its charge, and that what might have otherwise been harmless colloquy was magnified to a matter of substantial importance in the minds of the jury, by virtue of the Court's specific reference to prior

inconsistent statements in its instructions to the jury shortly before they retired, and the appellant thereby prejudiced in the jury's deliberations.

WHEREFORE, the appellant respectfully requests a re-hearing of this cause.

HARRY W. GOLDBERG,
Attorney for Appellant.
1511 K Street, N. W.,
Washington, D. C. 20005
Na. 6 3517

CERTIFICATE OF SERVICE

Copy of the foregoing Motion for Re-Hearing was sent to U.S. Attorney, District Courthouse, Washington, D. C. 20001, this 13th day of December, 1966.

HARRY W. GOLDBERG